Supreme Court, U. S.
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80-1125

No. _____

IN THE SUPREME COURT

OF THE UNITED STATES OF AMERICA

October, 1980, term

FRED W. BARTZ, et al.
v. THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI

from the UNITED STATES COURT OF CLAIMS

PETITION FOR WRIT OF CERTIORARI

John T. Nolan, attorney of record, for plaintiffs. *Lucas, Nolan, Bohanan & Moen*, 405 ISB & T Building, Iowa City, Iowa 52240, (319) 351-0221. *Thomas E. Perry*, *Edwin A. Hicklin*, and *Elizabeth A. Nolan*, of counsel.

Hubert M. Crean, with whom was *Assistant Attorney General James W. Moorman*, for Defendant. *James E. Brookshire*, of counsel.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Ruling of the Court of Claims (Exhibits 1 and 2) is contrary to the record evidence of the trial.

2. Whether it was error for the trial judge to adopt the defendant's computer simulation which was based upon "input" to the computer program that was totally unsupported by, and in fact, totally contrary to all of the record evidence on the crucial factor of the case; i.e., the effect of regulated river bankfull flow upon subsurface farm field drainage (freeboard), and water stagnation in the saturated farm field subsurface.

3. Whether the arbitrary obsequience by the Court to the government's unwarranted computer simulation denied

Plaintiffs their due process right to a fair trial based upon the evidence.

4. Whether the Court improperly ignored the testimony of the Cedar River farmers that there was no substantial crop damage along the sister river during the same years involved.

5. Whether the Court improperly refused to remand the companion claims based on trespass to the U.S. District Court without ruling on the merits.

6. Whether it was error for the Court to disregard the Iowa Constitutional (Art 1 §9) prohibition against consideration of the "benefits" conferred by the dam.

7. Whether the Court erred in denying plaintiffs' claim where such denial was in direct conflict with the prior decision of the same Court in Tri-State Materials Corp. v. U.S., 213 Ct.Cl.1, 550 F.2d 1 (1977).

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TABLE OF CONTENTS

and

TABLE OF AUTHORITIES

Table of Contents

	Page
QUESTIONS PRESENTED FOR REVIEW . . .	1
PARTIES TO PROCEEDING.	3
TABLE OF CONTENTS.	6
TABLE OF AUTHORITIES	7
REFERENCE TO OPINION	8
JURISDICTIONAL STATEMENT	8
(i) Date of Judgment Reviewed.	8
(ii) Date of Order Denying Rehearing.	8
(iii) Statutory Jurisdiction . .	9
STATUTES INVOLVED.	9
STATEMENT OF THE CASE.	10
JURISDICTION IN COURT OF CLAIMS. . .	12
ARGUMENT	12
APPENDIX EXHIBITS.	
(i) Opinion-Court of Claims. . (Trial Opinion Adopted)	1

(ii) Opinion-Trial Judge 1

(See [i] supra)

(iii) Order on Rehearing. 2

(iv) Excerpt of Findings of Fact . . . 3

(v) Transcript of Testimony 4

(vi) Explanation of "Freeboard". . . . 5

Table of Authorities

Cases

Tri-State Materials Corporation v. . . . 2

U.S., Ct. Cl. 1, 550 F.2d 1 (1977)

Statutes/Constitutional Provisions

5th Amendment, U.S. Constitution. . . 2,9,10

Act I, §18, Iowa Constitution 2,10

REFERENCE TO OPINION

The Plaintiffs' claim was disallowed by opinion (Exhibit 1) of the U.S. Court of Claims, Bartz, et. al. vs. The United States of America, Nos. 170-75, et. al., and Order denying Plaintiffs' Motion for Rehearing to Alter the Findings and Judgment and for a New Trial, dated October 3, 1980. (Exhibit 2)

JURISDICTION OF THE COURT

Plaintiffs' claims are for compensation pursuant to the United States Constitution, Article Five, for taking of riparian farmland by the U.S. Corps of Engineers.

i. Date of the Judgment and Decree and time of its entry is July 16, 1980. (Exhibit 1)

ii. Date of any Order respecting a

rehearing is October 3, 1980. (Exhibit 2)

iii. Statutory provision believed to confer jurisdiction on the Supreme Court to review the judgment or decree is 28 U.S.C. §1255(1).

STATUTES INVOLVED

No person shall be held to answer for a capital, or otherwise infamous crime, unless upon presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just

compensation

Amendment Five, Constitution of the United States of America.

Sec. 18 Private property shall not be taken for public use without just compensation first being made, or secured to be made to the owner thereof, as soon as damages shall be assessed by a jury, who shall not take into consideration any advantages that may result to said owner on account of the improvement for which it is taken.

Art. 1, §18, Constitution of the State of Iowa.

STATEMENT OF THE CASE

Plaintiffs owned farm fields adjacent to the Iowa River. The U.S. Corps of Engineers built and have since operated the Coralville Reservoir in order to reduce flood crests, and thereby regulate the

river flow at a lower rate (than flood-crest) over a longer period of time. In so doing, the river flow has been historically maintained (regulated) at bankful levels and artifically delayed and prolonged (with serious harm to crops) during the planting and growing seasons.

The high river flow at bankful levels blocks the natural drainage of the farm fields, saturates the "freeboard,"[1] suffocates or drowns the crops, prevents normal planting and cultivation, and has caused extensive crop damage and loss.

The Government used the nearby Cedar River Valley as a comparable river for weather effect on river flow. On rebuttal, Plaintiffs showed that similarly-situated farmers had no U.S. Corps of Engineer reservoir, no river regulation, and significantly no crop loss under natural conditions, all of which was

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[1] See Exhibit 5

ignored by the Court.

The Corps has blocked farm field drainage, caused substantial damages, and imposed an artificial flowage easement on Plaintiffs' farm fields.

Plaintiffs filed their claim in the U.S. Court of Claims with jurisdiction based under 28 U.S.C. §1491 for a 5th Amendment taking.

JURISDICTION IN COURT OF CLAIMS

Jurisdiction in the Court of Claims was invoked and based upon federal question jurisdiction (Fifth Amendment taking) pursuant to 28 U.S.C. §1491.

ARGUMENT FOR ALLOWANCE OF WRIT

The damage to the Plaintiffs by operation of the Coralville Reservoir is manifest. The cornerstone of the proof adduced by the Government; i.e., its

computer simulation, is not just unsupported, it is contrary to the record evidence.

The Government convinced the Court that the farmers' testimony established that farm fields dried out within ten days after the water was regulated off the top of their fields and this information served as the cornerstone of the computer simulation relied upon by the Court.

The record is clear that the farmers, to a man, said no such thing. The computer presumably did what it was told, but that had no relation to the facts in this case. The Government, in effect, pulled a fast one.

In adopting the Government computer simulation (including a dry "freeboard" contrary to the evidence), the Court has

so far departed from the accepted and usual course of judicial proceedings as to call for exercise of the U.S. Supreme Court's power of supervision (Title 28, S.Ct. Rule 17).

Plaintiffs include in Exhibit 4 (attached) reference to the farm testimony concerning the mythical ten-day dryout of the freeboard, and Exhibit 5 (a discussion of the term "freeboard" as used in this case).

Respectfully submitted this 18 day of December, 1980.

LUCAS, NOLAN, BOHANAN & MOEN
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By: _____
JOHN T. NOLAN
Attorney for Plaintiffs

APPENDIX

Exhibit 1
IN THE UNITED STATES COURT OF CLAIMS

Nos. 170-75; 185-75; 213-75
217-75, 222-75, and 352-75

(Decided July 16, 1980)

FRED W. BARTZ, et al.*
v. THE UNITED STATES

John T. Nolan, attorney of record, for Plaintiffs. *Lucas, Nolan & Bohanan, Thomas E. Perry, Edwin A. Hicklin* and *Elizabeth A. Nolan*, of counsel.

Hubert M. Crean, with whom was *Attorney General James W. Mooreman*, for defendant. *James E. Brookshire*, of counsel.

Before Kashiwa, Kunzig and Bennet, *Judges*.

PER CURIAM: This case comes before the court on plaintiffs' exceptions to the recommended decision of Trial Judge C. Murray Bernhardt, filed August 10, 1979, pursuant to Rule 134(h), and on plaintiffs'

*On April 14, 1979, 25 plaintiffs voluntarily dismissed their claims. One original plaintiff was transferred to the district court. Balmer, the original lead plaintiff, was among those dismissed. The successor and present lead plaintiff is Bartz.

motion filed April 21, 1980, for partial remand, having been submitted to the court on the briefs and oral argument of counsel. Upon consideration thereof, since the court agrees with the trial judge's recommended decision, as hereinafter set forth** it hereby denies plaintiffs' motion for partial remand and affirms and adopts the decision as the basis for its judgment in this case. Accordingly, plaintiffs are not entitled to recover, and the petitions are dismissed.

OPINION OF TRIAL JUDGE

BERNHARDT, *Trial Judge:* Some 112 owners of farms riparian to the Iowa River above and below the Coralville Dam sue under 28 U.S.C. §1491 for the Fifth Amendment taking

**Although the court adopted the trial judge's separate findings of fact and appendix (A), which are set forth in his report, they are not printed herein since such facts as are necessary to the decision are not contained in his opinion.

by inverse condemnation of portions of their farms by means of recurring flooding alleged to be due to the construction and operation of the dam. It is concluded that they are not entitled to recover.

Coralville Dam, a component of the comprehensive flood control plan for the Mississipii River Basin, was placed in operation in September, 1958. It is located at river mile 83.3 on the Iowa River, about 5 miles above Iowa City, Iowa. The dam controls an upstream drainage area of 3,084 square miles. The total drainage area of the Iowa River and its major tributary below the dam, the Cedar River, is about 12,640 square miles.

The plaintiffs fall into three groups. First, those upstream from the Coralville Reservoir, known as the "Marengo"

plaintiffs. Second, those between the dam and the downstream confluence of the Cedar River tributary at about river mile 29 on the Iowa River, known as the "Lone Tree" plaintiffs. Third, those below the Cedar River confluence and river mile 6.2 above the mouth of the Iowa River, known as the "Wapello" plaintiffs.[1] The flooding experience of each group varlied according to location in relation to the dam. Their common complaint is that, since the construction of the dam and Reservoir, water lingers on their properties for longer periods and interferes with their farming procedures and production. Many complain of

[1]There is an immaterial discrepancy in the defendant's facts of record classifying four plaintiffs as being within the Lone Tree category of plaintiffs even though their properties lie along the Iowa River slightly below the Cedar River confluence. The discrepancy does not alter the results.

subsurface saturation (i.e., excessively high water tables) which kills crops and reduces yields, and of floods occurring later in the growing season than before which harm immature plants at times too late to replant.

Technical evidence establishes that flooding and subsurface saturation increase susceptibility of plants to diseases and parasites, lose soil nutrients through denitrification and leaching, create ponds which inhibit oxygen circulation in the soil and beneficial bacterial activity, delay farm operations and prevent uniform treatment and lower soil temperatures.

The plaintiffs contend that the primary flood control purpose of the dam has been subverted to favor competing recreational and real estate interests

of the land fringing the Coralville Reservoir by maintenance of high Reservoir levels designed to minimize unsightly marshy fringes at lower levels, thereby reducing the Reservoir's storage capacity and requiring higher discharge rates from the dam on occasions of high inflows from heavy precipitation or snow melts. Plaintiffs also charge that the Corps' regimen of high Reservoir levels-and consequently low storage capacity-is maintenance to confer flood protection benefits on riparian owners on the parent Mississippi River into which the Iowa River discharges, to the plaintiffs' detriment.

In regulating the discharges from the dam and controlling the levels of the Reservoir the Corps endeavors to maximize the efficiency of the one and optimize the

storage capacity of the other by a constant juggling process. The regulatory scheme is based on a quantitative precipitation forecast prepared by the River Forecast Center. Rainfall predictions are added into streamflow data by use of a unit hydrograph to determine estimated Reservoir levels resulting from runoff and precipitation directly into the Reservoir. The Reservoir crew is kept constantly advised of imminent flood crests.

By these means the Corps has substantially enhanced the effective storage value of the Reservoir. For example, in 1973 the total river flow at Marengo (above the headwaters of the Reservoir) was 2,732,000 acre feet, or five times the 475,000 acre feet storage capacity of the Reservoir.

In response to complaints from down-

stream farmers the Army Corps of Engineers (hereafter "corps") inaugurated Plan 8 in 1963 and early 1964 for regulation of the dam's operation, but it did not resolve the complaints. Under Plan 8, the Reservoir elevation starts the year at 680 msl[2] by and generally (starting February 1) lowers to 670 msl by February 15, where it remains through June 15. The spring conservation pool level of 670 msl is exclusively for flood control, i.e., to increase Reservoir capacity to accommodate spring floods which customarily occur in the spring months. From June 15 to September 15 the Reservoir elevation is maintained at 680 msl. The summer conservation level of 680 msl benefits recreational uses of the Reservoir and insures against drought conditions. To

[2]Meaning: 680 feet above mean seal level.

some extent the operation of the dam, originally designed for the exclusive purpose of flood control, has been modified as stated to also benefit competing but subservient recreational and real estate interests.

Although plaintiffs contend that the dam is operated to benefit riparian owners on the Mississippi River to plaintiffs' detriment, in reality the dam is operated to modify the effects of each flood in sequence as it occurs. No preference is shown to non-Iowa River interests, but on the other hand, neither are Iowa River interests favored.

The Corps concedes that the dam lacks ideal storage capacity, but has shown that a larger dam was neither economically nor physically feasible. The size of the dam was limited by the geo-

graphy of its location, and even if a larger dam could have been built, the consequent greater storage capacity would have caused a higher pool elevation which would have been detrimental to the Amana Villages upstream from the head of the Reservoir.

Plaintiffs contend also that sedimentation, which reduces the storage capacity of the Reservoir, is one of the causes of their problem. Increased sedimentation, according to upstream plaintiffs, has extended the backwater effect of the Reservoir, while downstream plaintiffs allege that the reduced capacity of the Reservoir due to sedimentation has forced the Corps to increase dam discharges, thereby elevating the stream level. The contention is refuted by engineering data. Although the most

recent 1975 survey shows that since 1959 approximately 20 percent of the summer conservation pool (680 msl) has been filled with sediment (capacity reduced from 50,000 acre feet to 40,300 acre feet), and that the storage capacity below 670 msl has bwen reduced by approximately 50 percent (from 17,000 acre feet to 10,000 acre feet), sedimentation has had a negligible impact on the flood control capacity of the Reservoir. This is explained by the V configuration of the Reservoir, causing the bulk of its storage capacity to exist at higher elevations. The sedimentation rate has exceeded expectations because the inflow has been greater than the 30-year average, but at the end of 100 years of operation it is estimated that the Reservoir will retain 90 percent of its flood control pool at

712 msl. The sedimentation that has occurred thus far is insufficient to have produced the flooding and saturation effects of which the plaintiffs complain.

The Marengo plaintiffs, located at river mile 138 approximately 55 river miles upstream from the dam, have failed to show that sedimentation at present levels can cause the backwater effect they claim. Field surveys made in 1960, 1965 and 1969 show that the furthest upstream any backwater influence from Coralville Reservoir has occurred is between river miles 120 and 124.

All three groups of plaintiffs argue that the level of the ground water table has been raised by greater upstream flows which, alghough of lower elevation, nonetheless remain high for an extended period of time. However, plaintiffs have

failed to show that the ground water basin, in general, is responsive to streamflow. There is a relationship between rainfall and ground water level, but the response of ground water level to rainfall is very slow compared to the response of stream level to rainfall. Rain water percolates into the ground and recharges the ground water basin, whcih acts as a huge underground reservoir. The level of the ground water basin does not synchronize with changes in stream level. An exception to this general rule is with respect to the land immediately adjacent to the streambanks and extending back from it as much as 200 to 300 feet. At trial plaintiffs introduced evidence on this "bank storage" theory to the effect that water will move out of the streambed and into adjacent land when the

level of the water in the stream is higher than the water table of the adjacent land. For example, on November 14, 1969 (an excessively wet year), the stream level was higher than the adjacent ground water level and there existed a bank storage condition for about 200-300 feet back from the river. However, the theory is of minor significance in the present situation since most of the time the Iowa River is an effluent stream carrying ground water out of the basin rather than an influent stream carrying water into the river banks and recharging the ground water table. The bank storage phenomenon when it occurs is normally confined to relatively narrow strips of land parallel to the river.

This conclusion is further supported by the analysis of infrared aerial photo-

graphs supplied by the government. Infrared aerial photography and "remote sensing" technologies were used at trial in assessing relationships if streamflows and the agricultural uses of plaintiffs' farms bordering the river. Developed during World War II, infrared photography not only enables reliable detection of dead or decaying vegetation at early stages because of the early loss of infrared reflection, but has an enhanced ability to register ground moisture. Totally saturated soil appears black in the film. As soil drives out to 10-20 percent moisture content it becomes progressively lighter on the infrared film.

The accuracy of infrared photography was verified by actual onsite saturation tests correlating the May 11, 1976, infrared photography with observed data.

Samples taken from the darkest areas on the imagery showed saturation of 38 percent. Samples taken in light-tone areas showed 25 percent saturation. The 25 percent area supported travel by farm vehicles and appeared capable of cultivation. While recognizing the limitations of infrared photography, the government's exhibits are convincing evidence that the bank storage effect is physically limited to narrow strips of land on the river banks.

Normal annual rainfall over the Iowa and Cedar River Basin averages from around 30 inches over the headwater region to about 35 inches at the mouth of the river. During the April to September growing season Iowa normally receives about 70 percent of its total annual precipitation. Rainfall peaks in the month of June at a

normal amount of 5 inches. Since construction of the dam, rainfall of from one to four inches above annual norms was epxeriences in 1960, 1969, 1970, 1971 and 1974. In 1959, 1961, 1965, 1972 and 1973 annual rainfall averaged 5 inches or more above normal. Thus, in 10 of 16 post-dam years from 1959 through 1975 the annual rainfall was either above normal or sharply above normal.

High precipitation levels resulted in high runoff and high stream levels. Eighty of the 120 months between 1967 and 1976 had above normal streamflows. Thirty-one consecutive months from July 1972 to January 1975 had above normal streamflows. Twenty-six consecutive months from July 1970 to August 1974 were in the "excessive flow" or upper quartile of streamflows. July 1969 had the highest

monthly flow in all 888 months of recorded flows on the Cedar River.

The government prepared an elaborate "benefits analysis" by means described in Appendix A following the findings. Each of the years from 1959 to 1974 was analyzed for the potential of raising a crop, using two hypotheses: one, regulated flows with Coralville Dam in position, and two, unregulated flows without Coralville Dam. The benefits analysis reconstructed the crops saved, replants saved, yield reduction, and overtopping of levees and gravity drains allowed. In all but one area, wherever the regulatory effect of the dam was more than negligible crop benefits resulted from the dam. In essentially low water years which resulted in good crop years, such as 1963, 1964, 1967. and 1968, as well as the

wetter years 1959, 1961 and 1971,[3] crop results would have been the same with or without the dam in place. Plaintiffs' complaints of flooding are confined to essentially high water years.

The benefits analysis for the more troublesome wet years 1960, 1962, 1965, 1966, 1969, 1970, 1972, 1973 and 1974[4]

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[3]The level of precipitation during 1959 was strongly above average; however, the heaviest rainfall occurred during the end of March through the beginning of April. This allowed sufficient time for the soil to dry and permit a normal planting. 1961 also recorded strongly above normal rainfall but here again the rains missed the planting season. In 1961 March, July and September were among the wetter months while April, Man and most of June were rather dry. Therefore,under both regulated and unregulated modes, the crop yields were similar.

[4]Although 1962 and 1966 did not have above normal rainfall in total, the rainfalls that did occur was primarily during the growing season. In 1962 the end of May and the beginning of June, as well as the entire month of July, were wet. In 1966 the entire spring was quite wet, with the month of May experiencing the heaviest rainfall. The timing of the rainfalls is quite important. Where the growing season experiences unusually heavy and frequent storms the difference between the benefits gained from the regulated versus the unregulated condition is substantial.

demonstrates direct and clear benefits to the Lone Tree plaintiffs since the operation of the Coralville Dam. (See finding 58). Only a small measure of benefit or detriment was provided the Wapello plaintiffs by the dam during the wet years listed. This is because the flow at Wapello, where the river widens substantially and has a much larger capacity, is the product chiefly of unregulated tributaries, especially the Cedar River. In the Wapello area the dam controls only about one-fourth of the total Iowa-Cedar River watershed embracing over 12,000 square miles above Wapello. The plaintiffs in the Wapello area are beyond meaningful control by the Coralville Dam. The problem of ungauged and unregulated tributaries contributing significant amounts to the streamflow of the Iowa River is also

relevant to a lesser extent to the Lone Tree plaintiffs situated between the Coralville Dam and the confluence of the Iowa and Cedar Rivers.

Plaintiffs contend that the construction and operation of the dam generated inevitably recurring floods and constituted a "taking" of plaintiffs' properties by the government. Although plaintiffs concede that government operation made skillful use of the inadequate Reservoir capacity, they contend that in order to alleviate flooding in different downstream reaches of the Iowa River, or even the Mississippi River, it has been necessary at times for the Corps to create river stages in the Iowa River reaches down stream from the dam which are at times unavoidably detrimental to farming operations in the growing season. Plaintiffs

further contend that the result of the prolonged elevated river stages has been the blockage of natural drainage into the stream thereby causing subsurface saturation of adjacent lands. According to plaintiffs' argument this saturation has been and will continue to be a source of damage to plaintiffs' lands and will predictably worsen as sedimentation progresses in the storage pool.

Defendant denies any taking, contending that plaintiffs failed to prove that water problems experienced by all classes of plaintiffs were due to, or the consequences of governmental action, i.e., attributable to the dam. Defendant maintains that water problems experienced by downstream plaintiffs were not attributable to the dam. It asserts that water problems experienced by downstream plaintiffs

occurred despite and not because of the dam, and that the net benefits conferred by the dam to these plaintiffs were substantially in excess of any minor damage attributable to the dam.

Plaintiffs say that Iowa State law applies, since real property complaints are inherently a local matter. Under Iowa's constitution benefits are excluded from consideration when part of a tract is taken, the measure of damages being the difference in value of the tract before and after the taking, irrespective of any benefit. 3 NICHOLS ON EMINENT DOMAIN, 8.6211[16]. Iowa law is not applicable. In *Kohl v. United States*, 91 U.S. 367, 374 (1876), the court stated:

> if the United States have the power [of eminent domain] it must be complete in itself. It can neither be enlarged nor diminished by a state. Nor can any state prescribe the manner

> in which it [the power] must be exercised.

In *United States v. 19.86 Acres of Land in East St. Louis*, 141 F.2d 344 (1944), while interpreting a portion of *United States v. Miller*, 317 U.S. 369 (1943) dealing with the proper measure of compensation in condemnation proceedings, the Seventh Circuit stated that "the forms and methods of procedure afforded by the law of the state do not affect questions of substantive right." The Court in *Johnson v. United States*, 202 Ct.Cl. 405, 418, 479 F.2d 1383, 1390 (1973), held that the issue of what constitutes a "taking" is a "federal question" governed entirely by federal law, but that the meaning of "property" as used by the Fifth Amendment will normally obtain its content by reference to state law. *See also United States Ex. Rel. T.V.A. v. Powelson*,

319 U.S. 56, 279 (1943). The character of the property involved is not at issue here; the issue is whether there has been a Fifth Amendment taking of plaintiffs' properties. Clearly the issue is governed by federal law, and not the law of the State of Iowa.

We have noted earlier the area rainfall statistics, a rainfall preponderance during the April-September growing season, and the abnormal prevalence of rainfall during 10 of the 16 post-dam years. In those excessively wet years the Reservoir's high levels were often accompanied by high downstream water levels of both the Iowa River and its regulated and unregulated tributaries. Faced with the need to reduce the high levels of the Reservoir because of actual or impending heavy rainfalls in the area the Corps had no alternative to increasing

the rate of discharge from the dam, despite temporary consequences to downstream farmers.

Excessive precipitation was the root cause of the flooding experienced by palintiffs in the wet years of which they complain. The government's manipulation of releases from the dam played only a secondary role. The United States is not liable for flood damages unless directly attributable to governmental action. Indirect or consequential damages are not compensable. In several flooding cases plaintiffs have failed to recover under their Fifth Amendment claim because they failed to prove the element of inevitably recurring floods. *Fromme v. United States*, 188 Ct.Cl. 1112, 1118, 412 F.2d 1192, 1196 (1969); *National By-Products, Inc. v. United States*, 186 Ct. Cl. 546, 575-78, 405 F.2d 1256, 1272-74

1969; *North Counties Hydro-Electric Co. v. United States*, 108 Ct. Cl. 470, 70 F. Supp. 900 (1947); *North Counties Hydro-Electric Co. v. United States*, 138 Ct. Cl. 380, 151 F. Supp. 322, *cert. denied*, 355 U.S. 882 (1957); *B. Amusement Co. v. United States*, 148 Ct. Cl. 337, 180 F. Supp. 386 (1960). Here the damage was not the natural consequence of government action. Therefore, we need not speculate over the likelihood of recurrence of the physical conditions in the Iowa River Basin causing the damage experienced by plaintiffs during the years in issue.

For factual reasons heretofore detailed, the operation of the dam and Reservoir had no influence in producing the conditions of which the plaintiffs complaint in the Marengo area upstream from the Reservoir, and little if any influence

on the conditions complained of by plaintiffs in the Wapello area. As to the plaintiffs in the Lone Tree area, occasionally the lower areas of their farms bordering the river became too wet to farm. However, the great majority of these conditions occurred in excessively wet years and would in all likelihood have happened without the existence of the upstream dam. The remaining instances, where the operation of the dam caused sustained high levels of the stream which kept the lower areas of the adjacent farms too damp to farm, and which might properly be attributed primarily to the dam rather than to meteorological events, were heavily countervailed by the benefits to the farmlands as a whole, whether to rescue them from the damaging effects of floods or to save them from the conse-

quences of drought conditions. The benefits analysis study provided by the government, and which was not effectively challenged by the plaintiffs, demonstrated these benefits quite conclusively.

It was held in *United States v. Sponenbarger*, 308 U.S. 256, 266-67 (1939), that:

> if governmental activities inflict slight damage upon land in one respect and actually confer great benefits when measured in the whole, to compensate the landowner further would be to grant him a special bounty.

This principle was applied in *Ark-Mo Farms, Inc. v. United States*, 209 Ct. Cl. 116, 530 F.2d 1384 (1976), where the government's unchallenged hydrological data showed that the river control project had in fact decreased peaks, duration and frequency of high level floods at plaintiff's farm. Citing *Sponebarger*,

the court in *Ark-Mo Farms* held that it was a case of at most "little injury in comparison with far greater benefits conferred." To similar effect see the recent opinion in *Accardi v. United States*, 220 Ct. Cl. ____, 599 F.2d 423 (1979). The Fifth Amendment does not make the government an insurer against all damages from floods which may be incidental to projects conferring major benefits far outweighing detriments.

Plaintiffs are not entitled to recover.

CONCLUSIONS OF LAW

Upon the trial judge's findings and foregoing opinion which are adopted by the court, the court concludes as a matter of law that plaintiffs are not entitled to recover and, therefore, plaintiffs' petitions are dismissed.

APPENDIX

Exhibit 2

IN THE UNITED STATES COURT OF CLAIMS

Nos. 170-75, 185-75, 213-75,
217-75, 222-75, and 352-75

FRED W. BARTZ, et al,

v.

THE UNITED STATES.

Before KASHIWA, Judge, Presiding,
KUNZIG and BENNETT, Judges.

ORDER

This case comes before the court on plaintiffs' motion, filed July 29, 1980, pursuant to Rule 151(b), for rehearing to alter the findings and judgment and for a new trial with reference to the decision entered herein on July 16, 1980, dismissing plaintiffs' petitions. Upon consideration thereof, together with the response in opposition thereto, without oral argument,

IT IS ORDERED that plaintiffs' said motion for rehearing, filed July 29, 1980, be and the same is denied.

BY THE COURT

/s/

Shiro Kashiwa
Judge, Presiding

APPENDIX [1]
Exhibit 3

The government formulated a crop planting simulation pertaining to the plaintiffs' farms along the Iowa River below Coralville Dam. At trial, the government first presented its expert witnesses, Mr. Renz, a soil expert, Mr. Koellner, a hydraulic engineer, who testified on direct examination to establish the general procedure they used for the analysis of plaintiffs' properties for Coralville Dam benefits. After cross-examination, each then testified again on direct examination as to the farm of each particular plaintiff. Then the individual plaintiff whose farm had just been discussed on direct by the government's experts testified as to his farming experience during the relevant years, and was then subjected to cross-examination by government counsel. This procedure was

[1] Excerpt from Findings of Fact by Judge Bernhardt

repeated for each farm involved in the suit wherein its owner or operator was present at trial. This experiment with a novel trial procedure was logical under the circumstances and provided a coherent record.

Before each individual property was analyzed in the manner described, the following assumptions were made by the government's experts in the crop planting simulation: corn is from April 15 to June 1, and soybeans from May 1 to July 1, based on advice from Doane's Agricultural Services at Ottumwa, Iowa. Assuming that the river was over bank and had receded to within its banks, the simulation allowed a 10-day drying out period before crops could be planted. This information was obtained from three sources:[1] Mr. Renz, the soil scientist; Mr. Steinhibler, a ground

[1] Emphasis added

water hydrologist with the U.S. Geological Survey at Iowa City; and plaintiffs' testimonies.[1]

The government also assumed that an average rainfall of not more than 2 inches over the Iowa River Basin on one day would allow a crop to be planted at the end of a 10-day drying period. However, in the case of a 2-inch or more rainfall occurring on a single day, during that 10-day drying out period, an additional 5 days were added to the drying out period to assure more than adequate time for the property to drain. Again, the government relied on Doane's Agricultural Service's specific soil charts on infiltration rates to determine the necessary time allowed before owners could get back in the fields and plant a crop in ground that could support farming equipment.

[1]Emphasis added

Assumptions also were necessary in regards to the duration of water that was necessary to affect crop damage. For example, once the water rose and inundated part of a planted field, some damage occurred. It was ascertained that a corn crop would be lost if water inundated the crop for 4-5 days during the growing season (through August 31), and a soybean crop would be lost if inundated for 3 days during the growing season. Inundation was equivalent to at least one inch over the root zone, which would deprive the plant of oxygen needed for growth. If the inundation lasted for a period less than 4 to 5 days for corn, and less than 3 days for soybeans, there would be a reduced yield. Doane's Agricultural Services was the source for these assumptions.

APPENDIX

Exhibit 4

While Mr. Renz testified to many aspects of soil characteristics, the record does not support any reference to the crucial 10-day dry out.

Mr. Steinhibler's name first appears in the Court Order (not the record here) and may be confused with Sulo Wiitala, a witness here, but in neither event did the witness establish a 10-day dry out.

The three farmers (plaintiffs) referred to by the Court testified to a man that while the river was kept bank full, the fields did not dry out. This was specifically pointed out to the Court of Claims on Plaintiffs' Motion for Rehearing, p. 2 and 3 as follows:

The government based its contention and Judge Bernhardt found that the govern-

ment regulated river flow: (1) caused the farmers no crop damage; and (2) conferred a net benefit -- all based on the government's computerized simulation which in turn assumed

> "that the river was over bank and had receded to within its banks, the simulation allowed a ten-day drying out period before crops could be planted. ... This information was obtained from ... plaintiffs' testimonies." p. 36, Judge Bernhardt's opinion.

These plaintiffs' testimonies (cited at Defendant's Requsted Findings, p. 47) do not even suggest any such thing:

> Mr. Walker: "But if they've got the water held up against you, it ain't going to dry off so you can get at it." T. p. 97.

> Mr. Strong: "...and they raised their outflow to 10,000 (bank full)... By the next day, I had a swamp I couldn't even get through with a tractor." T. p. 120-121.

Mr. Womer: "...when the river comes up --- the water comes ... from up underneath ... we can't get to it (farming).

Mr. Koellner: (government witness on cross-examination):

Q. ...did you ever go out into the field to verify whether or not this foot-and-a-half of dry freeboard that you are assuming actually existed in the regulated simulation?

A. No, I did not. T. p. 1329-1330.

The most painstaking search will show that the reliance by the Court opinion, p. 36, that the assertion of a 10-day dry out by Messrs. Renz (assumed no river bank full water blockage to contend with) and Steinhibler (opinion only, unsupported by similar facts).

APPENDIX
Exhibit 5

FREEBOARD

As defined in the American College Dictionary, "freeboard" is: "noun, nautical, the part of a ship's side between the waterline and deck of the gunwhale;" obviously not a term normally applicable to the corn fields of Iowa.

The term was injected into this record by Judge Bernhardt, who hails from New England, as a rather apt description of the oxygenated soil above the phreatic line and the top of the farm field.

As applied to the Iowa corn field, it involves the route zone of the row crop (mainly filed corn or soy beans) in the field.

The inadequate understanding of the "freeboard" is crucial to this case for it is this area of the farm field that is involved in the planting, cultivation, growth, and support of the crops, and which, if

saturated by stagnant water, effectively suffocates and stunts or kills the growth of field corn or soy beans.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing instrument was served upon each of the attorneys of record of all parties to the above-entitled cause by enclosing the same in an envelope addressed to each such attorney at his respective address as disclosed by the pleadings of record herein, with postage fully paid, and by depositing said envelope in a United States Post Office depository in Iowa City, Iowa on this 2nd day of January, 19 87

By _____

No. 80-1125

In the Supreme Court of the United States

OCTOBER TERM, 1980

FRED W. BARTZ, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
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1. The Coralville Dam, a flood control dam on the Iowa River, was built by the United States Army Corps of Engineers in 1958, and since that time the dam has been operated by the Corps. Petitioners filed this action in the Court of Claims, contending that the Corps' operation of the dam has resulted in the frequent flooding and saturation of their lands, located along the Iowa River, and claiming compensation under the Fifth Amendment for the alleged "taking" of the lands thus affected (Pet. App. 2-3). The government contended that the problems experienced by petitioners were the result of abnormally high precipitation over a period of several years, and were unrelated to the operation of the Coralville Dam. The Court of Claims agreed, holding that "the great majority of these conditions occurred in excessively wet years and would in all likelihood have happened without the existence of the upstream dam" (Pet. App. 28). In those instances where the operation of the dam,

rather than "meteorological events," may have caused sustained high stream levels which kept lower portions of the adjacent farms too damp to cultivate, the court held that any ensuing damages "were heavily countervailed by the benefits to the farmlands as a whole, whether to rescue them from the damaging effects of floods or to save them from the consequences of drought conditions" (*id.* at 28-29).

2. The sole ground advanced in support of the petition is the contention (Pet. 13) that the court below had no basis for finding that petitioners' farms "dried out within ten days after the water was regulated off the top of their fields." The Court of Claims' holding, however, was not based upon any supposed drying out period, but upon the finding that flooding was caused primarily by abnormally high precipitation, and that damage resulting from such flooding as may in fact have been caused by the operation of the dam was slight in comparison to the benefits conferred by the existence of the dam. Petitioners' contention, consequently, is irrelevant to the court's conclusion. At all events, petitioners' argument consists of nothing more than a challenge to the Court of Claims' findings of fact, and, accordingly, does not warrant this Court's review. See *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 178 (1938).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

FEBRUARY 1981